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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JEHAN ZEB MIR,

Plaintiff and Appellant,

v.

MERCURY INSURANCE
GROUP et al.,

Defendants and
Respondents.

B286741

(Los Angeles County
Super. Ct. No. BC671792)

APPEAL from an order of the Superior Court of Los Angeles County, Debre K. Weintraub, Judge. Reversed and remanded.

Jehan Zeb Mir, in pro. per., for Plaintiff and Appellant.

Law Offices of Cleidin Z. Atanous and Cleidin Z. Atanous
for Defendants and Respondents.

Plaintiff Jehan Zeb Mir is a vexatious litigant who is subject to a prefiling order under Code of Civil Procedure¹ section 391.7, subdivision (a), that requires him to obtain permission from the courts of this state before filing any new litigation as a self-represented litigant or through counsel. Between November 1, 2016 and October 2017, Mir made numerous requests, first through counsel and then as a self-represented litigant, for permission to file a personal injury action arising from a car accident where the other driver was found to be 100 percent at fault by the automobile insurance companies. The trial court denied Mir's requests, finding the proposed action had no merit. Without permission from the court, Mir, as a self-represented litigant, proceeded to file a complaint against Tito Natividad (the at-fault driver), Natividad's automobile insurer, Mercury Insurance Company (Mercury), and the registered owner of the car that collided with Mir's car. After issuing an order to show cause regarding dismissal of the complaint for failure to comply with the prefiling order, the trial court dismissed the complaint, finding Mir failed to demonstrate "the litigation has merit and has not been filed for the purposes of harassment or delay" within the meaning of section 391.7, subdivision (b). Mir appealed from the order of dismissal. For the reasons explained below, we conclude the trial court erred in dismissing the complaint, and we reverse the order of dismissal and remand the matter for further proceedings not inconsistent with this opinion.

¹ Further statutory references are to the Code of Civil Procedure.

BACKGROUND

I. Mir Is Declared a Vexatious Litigant

On November 13, 2002, in *Mir v. Law Offices of Rushfeldt, Shelley & Drake LLP* (case No. TC015566), the Los Angeles County Superior Court declared Mir a vexatious litigant under section 391, subdivision (b)(1)-(2) and issued a prefiling order under section 391.7, subdivision (a), prohibiting Mir “from filing, whether in propria persona, or through counsel, any new litigation without first obtaining leave of the presiding judge of the court where the litigation is proposed to be filed, or the administrative presiding justice of the Court of Appeal if he attempts to file an appeal or writ petition.” On February 24, 2003, in *Mir v. Pomona Valley Hospital Medical Center* (case No. B148849), Division Two of this appellate district declared Mir a vexatious litigant under the same statutory grounds (§ 391, subd. (b)(1)-(2)) and issued a prefiling order of the same scope under section 391.7, subdivision (a): Mir “may not file any litigation in the courts of this state in propria persona or through an attorney without first obtaining leave of the presiding judge of the court in which the litigation is proposed to be filed.”

II. The Car Accident at Issue

Substantial evidence in the record, set forth with more specificity below, demonstrates: On February 5, 2015, Mir was in a car accident on a surface street with a driver insured by Mercury. Both cars sustained damage. Mir sought medical treatment for a back injury he alleged he sustained in the accident. The other driver was found to be 100 percent at fault in the accident by Mercury and Mir’s automobile insurer, State Farm Mutual Automobile Insurance Company (State Farm). The Centers for Medicare and Medicaid Services, Coordination of

Benefits and Recovery, sent Mir a letter authorizing him to file an action seeking reimbursement from Mercury and its insured for the medical expenses Medicare paid for Mir's injuries resulting from the February 5, 2015 car accident. State Farm paid \$5,000 under Mir's automobile coverage for medical payments arising from injuries Mir sustained in the car accident.

III. Mir Files Several Requests for Permission to File a Personal Injury Action Arising From the Car Accident, and the Trial Court Denies Them

On November 1, 2016, attorney John Schimmenti submitted a letter to the Los Angeles County Superior Court, directed to Presiding Judge Carolyn Kuhl, requesting permission, under section 391.7, subdivision (b), to file on behalf of Mir a personal injury action against Tito Natividad, arising from the February 7, 2015 car accident.² Schimmenti enclosed with the letter a form complaint for an unlimited civil action against Natividad, signed by Schimmenti, verified by Mir, and dated November 1, 2016. Schimmenti checked boxes on the form complaint, indicating Mir was asserting causes of action against Natividad for "motor vehicle" and general negligence and was seeking damages for loss of use of property, medical expenses,

² On the same date, Schimmenti sent a separate letter to Judge Kuhl, requesting permission to file on behalf of Mir a petition to compel arbitration against Mir's automobile insurer, State Farm, arising from a different car accident. The request for permission to file a petition to compel arbitration is not before us on appeal. We reference it to the extent it relates to the matter before us—the review of the trial court's dismissal of Mir's personal injury action arising from the February 5, 2015 car accident.

general damage, property damage, loss of earning capacity, pain and suffering, and emotional distress. The form causes of action for motor vehicle and general negligence, attached as additional pages to the form complaint, included allegations about how the car accident occurred³ and the nature of Mir's injuries ("extensive" vehicle damage and "pain, disability, nervousness, fright, depression, insomnia, nightmares and severe emotional distress lasting several months requiring physical therapy and medications").⁴ On November 29, 2016, Presiding Judge-Elect Daniel Buckley sent a responsive letter to Schimmenti, explaining that Schimmenti's November 1, 2016 request for permission to file the personal injury action had "been forwarded to Department 1 [of the Stanley Mosk Courthouse] for consideration."

On December 6, 2016, Mir submitted his own letter to the Los Angeles County Superior Court, directed to Judge Kevin Brazile in department 1 of the Stanley Mosk Courthouse. Mir explained that he was following up on attorney Schimmenti's November 1, 2016 letters, requesting permission to file a personal injury action against Natividad (and a petition to compel arbitration against State Farm). Mir represented that his

³ Mir alleges that as he was driving into a gas station, and Natividad was driving out, Natividad was not paying attention and was searching for something in his car as he made a turn and drove into the rear side of Mir's car.

⁴ The November 1, 2016 request for permission to file a personal injury action on behalf of Mir was attorney Schimmenti's one and only submission on behalf of Mir in this matter. Thereafter, Mir represented himself in this matter.

automobile insurer, State Farm, had been contacting him to inquire about the status of any litigation against Natividad because State Farm wanted reimbursement “for paying thousands of dollars in medical bills and for car repair,” resulting from the February 5, 2015 car accident. Mir asked that the court rule soon on the request for permission to file the personal injury action because the statute of limitations on personal injury causes of action against Natividad would expire in early February 2017.

On December 29, 2016, the trial court (Judge Brazile) issued a five-page order denying the November 1, 2016 requests submitted by attorney Schimmenti to file on behalf of Mir a personal injury action against Natividad (and a petition to compel arbitration against State Farm). The court ruled that Schimmenti required permission to file the new litigation on behalf of Mir because Mir, not Schimmenti, was “clearly dictating” the litigation, and Schimmenti was a “puppet” attorney.⁵ In support of this finding, the court referenced two other personal injury actions arising out of car accidents, in which Schimmenti filed the complaints on behalf of Mir and then withdrew as counsel a few months later, leaving Mir to litigate

⁵ In *In re Shieh* (1993) 17 Cal.App.4th 1154, this court concluded it is appropriate to extend a prefilng order issued under section 391.7 to new litigation filed by a vexatious litigant through counsel where the vexatious litigant retains attorneys who “serve as mere puppets” instead of “neutral assessors of his claims, bound by ethical considerations not to pursue unmeritorious or frivolous matters.” (*Shieh* at p. 1167; see also *Kinney v. Clark* (2017) 12 Cal.App.5th 724, 739 [*Shieh* remains good law].)

the cases himself. The court also cited a declaration Mir submitted in connection with the proposed petition to compel arbitration, which the court found indicated Mir “handl[ed] all the prefiling litigation activities himself.”⁶

Also in the December 29, 2016 order, the trial court denied Mir permission to file a personal injury action against Natividad, concluding Mir “failed to carry his CCP § 391.7(b) burden of proof to show the litigation has merit and is not being filed for purposes of harassment or delay.” The court noted that Schimmenti had submitted with the written request a verified complaint against Natividad but not “optional MC-701 form” (entitled “Request to File New Litigation by Vexatious Litigant”) or “supporting documentary evidence.” The court found Mir failed to demonstrate with evidence “that an accident occurred, that it was caused by Mr. Natividad, and that the amount of damages would place the case within the unlimited jurisdiction division of the court (i.e., damages exceeding \$25,000).” The court also found Mir’s statement in his December 6, 2016 letter to the court (referenced above) that State Farm was seeking reimbursement for payment of medical and car repair bills “implies that Dr. Mir has already been fully compensated by his insurance company for any losses and injuries: at a minimum, Dr. Mir has failed to evidence that there are any damages still uncompensated.”

⁶ As set forth above, the 2002 and 2003 prefiling orders against Mir already required him to seek permission from the court to file new litigation when represented by counsel, so the ruling that Schimmenti required permission to file a personal injury action on behalf of Mir, based on the particular facts of this case, was redundant.

On January 17, 2017, Mir submitted to the trial court, as a self-represented litigant, a 10-page pleading entitled “Application to File New Litigation.” Therein, he asserted he had “cured the deficiencies” the court pointed out in its December 29, 2016 order as the reasons the court denied Schimmenti’s November 1, 2016 request for permission to file the personal injury action against Natividad on behalf of Mir. In the application, Mir described the circumstances of the car accident and stated that both his insurer (State Farm) and Natividad’s insurer (Mercury) “adjudged Natividad [] 100% negligent and liable for causing [the] accident.” He also discussed his alleged damages, stating his injuries from the car accident required four months of physical therapy and medications. He represented that State Farm paid \$5,000 of the physical therapy costs and Medicare paid other medical bills, but neither had been reimbursed by Natividad or Natividad’s insurance company (Mercury). Mercury paid to repair Mir’s car but refused to compensate Mir for medical expenses, pain and suffering, emotional distress, or loss of earning capacity for four months “in an approximate amount of \$30,000 per month” as a “Board Certified Surgeon and Trauma, Cardiovascular Surgeon performing locum tenens services.” According to Mir, Mercury “declined to disclose to [Mir] the amount of the coverage available under Natividad’s automobile insurance policy.” Mir also argued in the Application to File New Litigation that Schimmenti was not a “puppet” attorney, as the trial court found in the December 29, 2016 order denying Schimmenti’s request to file a personal injury action against Natividad on behalf of Mir.

Mir attached numerous documents to his January 17, 2017 Application to File New Litigation: (1) his declaration describing how the car accident occurred and the nature of his alleged

damages; (2) photographs of the damage to the two cars after the accident; (3) a January 10, 2017 letter to Mir from State Farm (Mir's insurer), stating that the driver who collided with Mir's car (Mercury's insured) "was considered to be 100% liable for inattention";⁷ (4) a January 10, 2017 State Farm payment log, showing State Farm paid \$5,000 under Mir's automobile coverage for medical payments; (5) a February 23, 2015 referral for Mir to attend physical therapy three times per week for nine weeks for "acute pain due to trauma," lumbago, lumbar degenerative disc disease, and lumbosacral spondylosis without myelopathy; (6) form MC-701 (Request and Order to File New Litigation by Vexatious Litigant), describing the car accident and the nature of Mir's alleged damages; and (7) a form complaint against Natividad, signed by Mir as a self-represented litigant, verified by Mir, and dated January 17, 2017.⁸

On January 30, 2017, Mir sent a letter to the Los Angeles County Superior Court, directed to Judge Debre Katz Weintraub in department 1 of the Stanley Mosk Courthouse, following up on his January 17, 2017 Application to File New Litigation. In the letter, Mir represented that within the past seven years, he had not filed any new litigation as a self-represented litigant that was

⁷ In the letter, State Farm referred to the driver of the other vehicle in the car accident (Mercury's insured) as John Catamisan, not Tito Natividad. This appears to be an error on State Farm's part, as explained later in this opinion.

⁸ This form complaint is identical to the one attorney Schimmenti submitted on behalf of Mir on November 1, 2016, except that this version includes an allegation about Mir's loss of earning capacity for four months as a surgeon, in a total amount of \$120,000.

finally determined adversely to him within the meaning of the vexatious litigant statute, section 391, subdivision (b). He further represented that he had a personal injury action pending in Los Angeles County Superior Court, that was filed on his behalf by his attorney and was meritorious in that the other driver in the car accident admitted liability. He also stated that in another personal injury action filed on his behalf by his attorney, the defendant's insurance company settled with him.⁹ Mir further asserted in the letter that the federal government "is an interested party in the proposed personal injury case against Natividad because Medicare paid medical benefits and hold[s] a Statutory Lien in the Settlement or Judgment amount." Finally, Mir reiterated that the statute of limitations on personal injury causes of action against Natividad would expire within the week.

On February 3, 2017, the trial court (Judge Weintraub) issued a 10-page order denying Mir's January 17, 2017 Application to File New Litigation.¹⁰ Therein, the court stated that the "primary evidence Dr. Mir submits to establish Mr.

⁹ These are the two personal injury actions referenced in the trial court's December 29, 2016 order denying attorney Schimmenti's November 1, 2016 request for permission to file a personal injury action against Natividad on Mir's behalf, as discussed above. In both other personal injury actions, Schimmenti filed complaints on behalf of Mir and then withdrew as counsel a few months later, leaving Mir to litigate the cases himself.

¹⁰ In the same February 3, 2017 order, the trial court also denied a January 19, 2017 application, submitted by Mir as a self-represented litigant, for permission to file a petition to compel arbitration against State Farm.

Natividad’s liability”—the January 10, 2017 letter to Mir from State Farm that Mir attached to his application (described above)—states John Catamisan, not proposed defendant Tito Natividad, was the driver of the other vehicle involved in the car accident. Based thereon, the court concluded Mir “failed to establish that the defendant he seeks to sue was in fact involved in – much less at fault for – the subject accident” and, therefore, Mir “failed to carry his CCP § 391.7(b) burden of proof to show that his proposed litigation against Tito Natividad for a February 7, 2015 motor vehicle accident has merit and is not for purposes of harassment or delay.” The court noted in the order that Mir’s California medical license was revoked effective November 13, 2002. The court added, however, that it did not need to “address[] whether Dr. Mir has sufficiently supported his claim for damages – especially as to lost earnings, in light of his revoked license” – because Mir did not present evidence demonstrating Natividad was the other driver involved in the car accident. Regarding Mir’s assertion in his January 30, 2017 letter to the court (discussed above), indicating that he did not meet one of the four definitions of a vexatious litigant set forth in section 391, subdivision (b), the court noted that Mir had not been removed from the vexatious litigant list pursuant to section 391.8.¹¹

¹¹ Section 391.8 allows a “vexatious litigant subject to a prefilming order under Section 391.7 [to] file an application to vacate the prefilming order and remove his or her name from the Judicial Council’s list of vexatious litigants subject to prefilming orders.” Mir did not file such an application below.

IV. Mir Files Complaint Against Natividad and Mercury in Federal Court, and the Court Dismisses It

On or about February 5, 2017, Mir filed as a self-represented litigant an action against Mercury and Natividad in the United States District Court for the Central District of California, arising from the February 5, 2015 car accident. Mir asserted a first claim for relief for payment of medical bills under the Federal Medical Care Recovery Act (42 U.S.C. § 2651 et seq.), based on allegations that Mercury refused “to reimburse for the payments made by Medicare and others” for Mir’s medical bills. Mir asserted a second claim for relief for general negligence causing motor vehicle accident and personal injuries. In this federal action, Mir sought from Mercury and Natividad, jointly and severally, \$120,000 in compensatory damages and payment of all medical bills. From Mercury, Mir also sought an additional \$1 million in punitive damages for bad faith in declining to settle his claim and refusing to pay his medical bills.

Mercury and Natividad filed a motion to dismiss Mir’s complaint. On July 18, 2017, the federal district court issued an order granting the motion to dismiss based on lack of federal question jurisdiction, explaining: “Although Section 2651(a) of the MCRA [Federal Medical Care Recovery Act] allows the government to authorize a plaintiff to bring a claim on its behalf, the statute does not create federal question jurisdiction merely because the United States may have a pecuniary interest in the outcome of the suit.” The court ordered: “Plaintiff’s complaint is dismissed without leave to amend but without prejudice to refiling in state court.”

V. Mir Files Complaint Against Natividad and Mercury in Los Angeles County Superior Court, and the Court Dismisses It

On July 27, 2017, Mir filed a pleading in Los Angeles County Superior Court, as a self-represented litigant, requesting judicial notice of the federal district court proceedings—in particular the July 18, 2017 order that his complaint was dismissed without prejudice to refile in state court—and a declaration that he “does not require a pre-filing order for filing new litigation when represented by an attorney.” In this pleading, Mir raised numerous issues, including (1) an argument that he did not require the superior court’s permission under section 391.7 to refile his federal complaint in state court because it was not “new litigation”; (2) an assertion that his claim for loss of four months’ earnings as a surgeon was based under his then-active Pennsylvania medical license and not his revoked California medical license;¹² and (3) a representation that he was “considering” retaining an attorney in this matter.

Mir attached 14 exhibits to his July 27, 2017 pleading, including: (1) a July 25, 2017 letter from State Farm confirming that Natividad was the named insured on the Mitsubishi vehicle insured with Mercury, and “the driver of the Mitsubishi [was]

¹² On the court’s own motion, we take judicial notice of the online records of the Pennsylvania State Board of Medicine, showing that Mir’s Pennsylvania license as a medical physician and surgeon was effective until December 4, 2015, 10 months after the car accident at issue. Like his California medical license, Mir’s Pennsylvania medical license was revoked.

100% negligent in the [February 5, 2015] accident”;¹³ (2) Mir’s federal court complaint and opposition to the motion to dismiss, and the federal district court’s order granting the motion to dismiss and judgment dismissing the complaint; (3) a February 10, 2017 letter to Mir from the Centers for Medicare and Medicaid Services, Coordination of Benefits and Recovery, stating in pertinent part, “Medicare acknowledges that you may file a claim and/or a civil action against a third party,” seeking damages for injuries sustained and medical expenses incurred as a result of the February 5, 2015 car accident; (4) a July 22, 2003 order issued by Division Three of this appellate district in *Mir v. Iungerich & Spackman* (case No. B167530), stating Mir did not require leave of court to proceed with his appeal— notwithstanding the prefiling order issued by Division Two in February 2003 in *Mir v. Pomona Valley Hospital Medical Center* (case No. B148849), requiring Mir to obtain the court’s permission to file new litigation even when represented by counsel—because Mir was now represented by a different attorney who did not appear to be a puppet; and (5) a November 29, 2012 order issued by the Los Angeles County Superior Court (Judge Kuhl), stating Mir was not required to obtain leave of court to file a personal injury action arising from a car accident because the proposed complaint was prepared by counsel and Mir was not filing the action as a self-represented litigant.

On August 10, 2017, Mir filed in Los Angeles County Superior Court, as a self-represented litigant, a verified (non-

¹³ In the letter, State Farm explained: “We were not able to confirm the driver of the Mitsubishi as we did not speak with the driver or owner of the vehicle.”

form) complaint against Mercury, Natividad and Gregory John Catamusa.¹⁴ Notwithstanding Mir's status as a vexatious litigant and the prefiling order against him, the clerk of the court allowed the filing of the complaint. Mir asserted the same two causes of action he had asserted as claims for relief in the federal district court: (1) general negligence causing motor vehicle accident and personal injuries and (2) payment of medical bills under the Federal Medical Recovery Act (42 U.S.C. § 2651 et seq.). As he had in the prior pleadings described above, Mir alleged in the complaint the circumstances of the February 5, 2015 accident and Natividad's negligence; the types of injuries he suffered; the medical treatments he underwent, including physical therapy and medications; Mercury's refusal to reimburse payments for medical expenses and to compensate Mir for pain and suffering, emotional distress, and loss of earnings as a surgeon; and Medicare's authorization for Mir to sue to recover amounts Medicare had paid to an orthopedic surgeon and chiropractor for injuries arising from the accident. Mir sought from Natividad and Mercury, jointly and severally, payment of all medical bills and other compensatory damages. From Mercury, Mir also sought \$1 million in punitive damages for bad

¹⁴ Apparently, Gregory John Catamusa is the same person State Farm referred to in its January 10, 2017 letter to Mir as John Catamisan. It is not clear from the record which spelling of the surname is accurate. In the complaint, Mir alleged Catamusa was the registered owner of the Mitsubishi at the time of the February 5, 2015 car accident and was personally liable for the acts of Natividad, the driver of the Mitsubishi at the time of the accident.

faith in declining to settle his claim and refusing to pay his medical bills.

Mir attached to the August 8, 2017 complaint: (1) the federal district court's judgment dismissing his claims against Natividad and Mercury without prejudice to refiling in state court; (2) photos of the damages to the vehicles after the February 5, 2015 car accident; and (3) letters to and from the Centers for Medicare and Medicaid Services, Coordination of Benefits and Recovery, regarding authorization for Mir to sue to recover damages for the injuries he sustained and the medical expenses he incurred in the car accident.

On September 8, 2017, the trial court (Judge Weintraub) issued a nine-page minute order denying Mir the relief he sought in his July 27, 2017 pleading: a declaration that he is not required to obtain leave of court to file new litigation when he is represented by counsel and a declaration that he was not required to obtain leave of court to file the present action because the refiling of his dismissed federal claims in state court does not constitute "new litigation." As to the first, general request, the court concluded the requested declaration would be an "improper advisory opinion." As to the second, specific request, targeted to the present action, the court concluded the federal court's "ruling did not in any way indicate that Dr. Mir was entitled to circumvent the regular procedures and processes associated with filing state court cases, including the requirement that Dr. Mir comply with CCP § 391.7." Also in the September 8, 2017 order, the trial court set an order to show cause for October 13, 2017 regarding dismissal of the present action, pursuant to section

391.7, subdivision (c), because Mir failed to obtain the court's permission before filing the action.¹⁵

On October 10, 2017, Mir filed an opposition to the order to show cause and a request for a continuance of the October 13, 2017 hearing on the order to show cause based on his representation he already had a hearing in another case scheduled for October 13. The only argument Mir raised in his opposition to the order to show cause was that he did not require the court's permission under section 391.7 to refile his federal claims in state court because it was not "new litigation."

On October 11, 2017, the trial court (Judge Weintraub), without a hearing, issued an eight-page order denying Mir permission to proceed with the present action and dismissing it. In the order, the court discussed the history of this matter, beginning with attorney Schimmenti's November 1, 2016 request to file a personal injury action against Natividad on Mir's behalf. After considering the numerous prior submissions and trial court rulings, the court concluded "the information submitted by Dr. Mir fails to make a sufficient showing, as required by CCP § 391.7(b), that his proposed litigation has merit and is not being

¹⁵ Under section 391.7, subdivision (c), "If the clerk mistakenly files the litigation without the order [from the presiding judge permitting the filing], . . . [the] presiding judge may direct the clerk to file and serve, on the plaintiff and other parties a notice stating that the plaintiff is a vexatious litigant subject to a prefiling order as set forth in subdivision (a). The filing of the notice shall automatically stay the litigation. The litigation shall be automatically dismissed unless the plaintiff within 10 days of the filing of that notice obtains an order from the . . . presiding judge permitting the filing of the litigation as set forth in subdivision (b)."

filed for purposes of harassment or delay.” The court noted that it had already, in the September 8, 2017 order discussed above, rejected Mir’s argument that the present action does not constitute “new litigation” because the same claims were filed previously in the dismissed federal court action. The court declined to revisit that issue.

Mir, as a self-represented litigant, filed a timely notice of appeal from the trial court’s October 11, 2017 order of dismissal. He sought and obtained from this court permission to file the notice of appeal under section 391.7, subdivision (b). Mercury and Natividad filed a respondents’ brief on appeal. The other individual, who Mir named in his complaint as defendant Gregory John Catamusa, did not file an appellate brief.

DISCUSSION

I. Dismissal of Action for Failure to Obtain Permission to File Under Section 391.7, Subdivision (b)

Mir contends the trial court erred in dismissing his complaint because the complaint is meritorious within the meaning of section 391.7, subdivision (b). We agree.

As set forth above, under section 391.7, subdivision (c), “If the clerk mistakenly files [new] litigation without [an] order [from the presiding judge permitting the filing], . . . [the] presiding judge may direct the clerk to file and serve, on the plaintiff and other parties a notice stating that the plaintiff is a vexatious litigant subject to a prefiling order as set forth in subdivision (a). The filing of the notice shall automatically stay the litigation. The litigation shall be automatically dismissed unless the plaintiff within 10 days of the filing of that notice obtains an order from the . . . presiding judge permitting the filing of the litigation as set forth in subdivision (b).”

When an individual is subject to a prefiling order under section 391.7, subdivision (a), the presiding judge “shall permit” the individual to file new litigation “only if it appears that the litigation has merit and has not been filed for the purposes of harassment or delay.” (§ 391.7, subd. (b).) In the appellate context, where there is case law discussing the issue, the standard for granting permission to file new litigation (a notice of appeal) under section 391.7, subdivision (b) is “ ‘the simple showing of an arguable issue.’ ” (*Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 541.) While the standard—“appears that the litigation has merit”—may not be more specifically defined by case law in the trial court context, the standard is not as stringent as the one the trial court applied.

Here, the trial court held Mir to a standard not set forth in or contemplated by section 391.7, subdivision (b): the trial court required Mir to present evidence proving the allegations of his proposed complaint (including the amount of his damages) in order to obtain permission to file the complaint. (Compare § 391.2, which expressly states “the court shall consider any evidence, written or oral, by witnesses or affidavit,” presented in connection with a motion under section 391.1 to require a plaintiff to furnish security to maintain an action, based on the ground the plaintiff is a vexatious litigant and there is not a reasonable probability the plaintiff will prevail in the litigation against the moving defendant.) In the respondents’ brief, Mercury and Natividad urge this court to apply the same erroneous standard the trial court did, arguing that “Mir never provided any evidence regarding his claimed lost wages or that he was not fully compensated by existing payments.” A vexatious

litigant is not required to prove his entire case before he may be granted permission to file a complaint.

Based on substantial evidence in the record, the present personal injury action clearly meets the standard of merit for filing under section 391.7, subdivision (b). There is no dispute that Mir was in a car accident with Mercury's insured, and Mercury's insured was deemed 100 percent at fault in the accident by both insurance companies. Mir sought medical treatment for injury to his back. Medicare paid medical expenses for Mir's injury, which Mercury refused to reimburse. Medicare authorized Mir to seek reimbursement through a personal injury action. Mir was licensed as a surgeon in Pennsylvania for 10 months following the car accident and claims he lost earnings for four months as a physician in loco tenens because he could not perform work due to his injuries. Neither the trial court nor Mercury/Natividad pointed to any evidence indicating Mir filed this action for harassment or delay. Based on his showing, Mir is entitled under section 391.7, subdivision (b) to proceed with his causes of action, and the trial court erred (under either an abuse of discretion or a substantial evidence standard) in dismissing his complaint at this juncture.¹⁶ Accordingly, we reverse the order of dismissal.¹⁷ We express no opinion on whether Mir's causes of action can withstand any dispositive motion or be proven at trial.

¹⁶ Mir made a sufficient showing of merit for filing of this personal injury action under section 391.7, subdivision (b), well before the two-year statute of limitations for personal injury actions under section 335.1 expired in early February 2017.

¹⁷ Because we reverse the order on this basis, we need not address Mir's contentions that we should reverse the order

II. Application for Order to Vacate Prefiling Order and Remove Mir From Judicial Council Vexatious Litigant List

As set forth above, Mir did not file below an application under section 391.8, subdivision (a) to vacate the prefiling order and remove his name from the Judicial Council's list of vexatious litigants subject to prefiling orders. He attached such an application (form VL-120), however, to the end of his opening appellate brief in this matter.

Section 391.8, subdivision (a) provides that an application to vacate a prefiling order and remove a name from the Judicial Council's list of vexatious litigants subject to prefiling orders "shall be filed in the court that entered the prefiling order, either in the action in which the prefiling order was entered or in

because (1) the refiling of the dismissed federal claims in state court does not constitute "new litigation," requiring leave of court for filing under section 391.7; and (2) Mir does not require permission from the court before filing new litigation when he is represented by counsel, and attorney Schimmenti was not a "puppet." We reject Mir's contention that the vexatious litigant statutory scheme is unconstitutional because it treats pro se litigants differently than attorneys. "[W]e cannot assume, contrary to the evident premise of section 391.7, that attorneys generally will fail to act as gatekeepers against frivolous litigation. 'Attorneys are governed by prescribed rules of ethics and professional conduct, and, as officers of the court, are subject to disbarment, suspension, and other disciplinary sanctions not applicable to litigants in propria persona.' [Citation.] 'Since fewer sanctions are available against a *pro per* litigant, the power to declare him vexatious becomes an important tool for the courts to manage their dockets and prevent frivolous claims.'" (*Shalant v. Girardi* (2011) 51 Cal.4th 1164, 1176.)

conjunction with a request to the presiding justice or presiding judge to file new litigation under Section 391.7.” The application form that Mir used (form VL-120) states prominently on the first page: “Important, please read: This application must be filed in the court that entered the prefiling order, either in the action in which the prefiling order was entered or in conjunction with a request to the presiding justice or presiding judge to file new litigation under Code of Civil Procedure section 391.7. . . .”

Based on the foregoing requirement, Mir’s application for an order to vacate the prefiling order and remove him from the Judicial Council’s vexatious litigant list is not properly before us and we may not act on it. The presiding justice of this court or presiding judge of the superior court must consider such an application in conjunction with a request to file new litigation under section 391.7. In the future, should Mir seek permission from this court or the Los Angeles County Superior Court to file new litigation, pursuant to section 391.8, subdivision (a), he may at the same time submit an application to vacate the prefiling order and remove his name from the vexatious litigant list. We express no opinion on the merits of such an application.

DISPOSITION

The October 11, 2017 order dismissing Mir's complaint is reversed, and the matter is remanded for further proceedings not inconsistent with this opinion. Mir is entitled to recover costs on appeal.

NOT TO BE PUBLISHED

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

SINANIAN, J.*

* Judge of the Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.